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Supreme Court, U.S.
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No. _____

In The
Supreme Court Of The United States

OCTOBER TERM, 1988

COLIN C.J. ANGLICKER, M.D., Director,
Whiting Forensic Institute,
Petitioner

v.

BENJAMIN F. MILLER, JR.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Does the rule of *Brady v. Maryland*, 373 U.S. 83 (1963), which concerns the justice of a finding of guilt or the imposition of punishment, extend to a criminal trial in which no guilt is found and no punishment is imposed?

2. If *Brady* applies, does the State's failure to disclose exculpatory evidence entitle an insanity acquittee to federal habeas corpus relief when: (1) competent defense counsel has strategically and successfully asserted the insanity defense at trial; and (2) disclosure of the exculpatory evidence would not have changed counsel's strategy?

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v.

BENJAMIN F. MILLER, JR.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Colin C.J. Anglicker, M.D., petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on May 20, 1988.

OPINIONS BELOW

The petitioner's appendix contains: (1) The opinion of the United States Court of Appeals for the Second Circuit; (2) The opinion of the United States District Court for the District of Connecticut; and (3) The opinion of the Connecticut Appellate Court, which is reported at 4 Conn. App. 406, 494 A.2d 1226 (1985). The Connecticut Supreme Court's denial of certification to the Connecticut Appellate Court is reported at 197 Conn. 809, 499 A.2d 59 (1985).

JURISDICTION

The United States Court of Appeals for the Second Circuit decided this case on May 20, 1988. On June 22, 1988, the Court of Appeals denied the petitioner's petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part, that: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that: "No state shall . . . deprive any person of life, liberty, or property without due process of law. . . ."

STATUTES INVOLVED

Title 28, Section 2241 of the United States Code provides, in pertinent part, as follows: "(c) The writ of habeas corpus shall not extend to a prisoner unless . . . . (3) He is in custody in violation of the Constitution or laws or treaties of the United States. . . ."

Title 28, Section 2254 of the United States Code provides, in pertinent part, as follows: "(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

STATEMENT OF THE CASE

A. Facts Underlying The Respondent's Acquittal By Reason Of Insanity

The respondent was arrested and indicted in the Connecticut Superior Court in 1972 for the murders of five black prostitutes in Stamford, Connecticut. App. at 3A. All of the prostitutes had been found strangled in a wooded area off the Merritt Parkway during the period from 1967 to 1971. App. at 3A.

Upon his arrest and after receipt of the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966), the respondent made incriminating statements to police officers. App. at 5A. These statements included specific, detailed accounts of the murders of two of the victims and contained facts which were unknown to the general public. App. at 5A.

Attorney Herbert Bundock was appointed to represent the respondent, who pleaded not guilty to the five-count indictment. App. at 7A. On June 6, 1972, Bundock filed a motion for discovery which included a request for all exculpatory evidence in the possession of the State. App. at 7A. The State's Attorney, Joseph Gormley, allowed Bundock free access to the State's file in the case. App. at 10A. Bundock obtained, *inter alia*, two psychiatric reports which concluded that the respondent was competent to stand trial. App. at 39A.

During his investigation of the case, Bundock spoke with the respondent and his father, who complained that the confessions had not been voluntary. App. at 7A. Realizing the apparent mental illness of his client, Bundock successfully moved for the appointment of a psychiatrist to examine the respondent. The psychiatrist concluded that, while he had "no certain idea of [respondent's] guilt or innocence," the respondent was "totally incapable of discerning right from wrong" and the "force of his insanity drove him into the midst of the daily life of the people he is accused of having murdered."

App. at 8A. The respondent's illness was ultimately diagnosed as chronic undifferentiated schizophrenia. App. at 5A.

In light of this diagnosis and the respondent's peculiar knowledge of unpublicized details of the murders, Bundock decided not to move for suppression of the confessions. App. at 48A. Rather, he entered into a trial agreement with the State's Attorney in which the respondent would plead not guilty and would assert an insanity defense. In turn, the State agreed to drop two of the five murder counts, proffer only a prima facie case as to the remaining three counts, and join in recommending to the trial court that the respondent be acquitted by reason of insanity. App. at 10A. Both the respondent and his father willingly participated in the trial agreement. App. at 40A.

On January 30, 1973, a one-day trial on the three murder counts ensued before a three-judge panel. The State's evidence consisted primarily of the respondent's confessions. The respondent, in turn, presented psychiatric testimony supporting his insanity defense. App. at 10A. Agreeing that the respondent suffered from schizophrenia, both the defense counsel and the State's Attorney urged the trial court to acquit the respondent by reason of insanity. App. at 10–11A.

After a brief recess, the court entered the acquittal as to all counts and then, pursuant to State statute, committed the respondent to the custody of the commissioner of mental health pending an examination to determine whether he was a danger to himself or to others. App. at 11A; *see* Conn. Gen. Stat. § 53a-47(c) (1971 Rev.) (providing for involuntary confinement of insanity acquittees, subject to periodic review). On March 29, 1973, the respondent was found to be a danger to himself and to others and was committed to the custody of the commissioner of mental health. App. at 11A.

B. The Undisclosed Evidence

On July 29, 1972, several months prior to the respondent's acquittal by reason of insanity, Robert Lupinacci was apprehended in the act of attempting to strangle a black prostitute in the same area where the murders had occurred. App. at 8A. Lupinacci was a known patron of Stamford's black prostitutes and admitted to having taken other prostitutes to the same place where the assault had occurred. App. at 9A. Police investigation revealed additional information which implicated Lupinacci in three of the Stamford murders. Recognizing its similarity to the respondent's case, police submitted their file on Lupinacci to the State's Attorney. App. at 10A. Although the State's file on the respondent had been open for inspection by Bundock as a result of his general discovery request, the State's Attorney did not offer him access to the Lupinacci file and did not disclose the contents of that file. App. at 10A.

Scientific comparison by the FBI of twenty-three items of evidence obtained from the murder scenes with evidence from the Lupinacci case revealed no solid evidence linking him to the murders with which the respondent had been charged. App. at 41A. Lupinacci was charged with assault and the investigation was closed on September 23, 1972, four months prior to the respondent's trial. App. at 41A.

Attorney Bundock was aware of the Lupinacci case; the respondent's father had sent him newspaper clippings regarding the arrest. App. at 8A. Bundock was convinced, however, that respondent's confessions revealed details that he would have known only if he were the killer. As a result, he did not further investigate the possibility that the respondent did not commit the murders and did not pursue any investigation regarding Lupinacci. App. at 8A. Rather, he asserted the insanity defense contemplated under his agreement with the State's Attorney. App. at 48A.

C. Habeas Corpus Proceedings

In 1982, the respondent sought habeas corpus relief in the Connecticut Superior Court upon the ground that he had been denied the effective assistance of counsel at trial and that the State had violated his due process rights by its failure to disclose exculpatory information. *Brady v. Maryland*, 373 U.S. 83 (1963) (hereinafter *Brady*). The habeas court denied the petition on both grounds. App. at 35A. As to the due process claim, the court had "substantial doubt" as to whether the Lupinacci material, although exculpatory, would have been admissible at trial under state law and noted that "the information in the hands of the State's Attorney was [not] sufficient to create a reasonable doubt that did not otherwise exist." App. at 11-12A.

The Connecticut Appellate Court affirmed. *Miller v. Anglicker*, 4 Conn. App. 406, 494 A.2d 1226 (1985); App. at 34A. The court held that, although the Lupinacci material was "clearly" and "obviously" exculpatory of the respondent, the test of materiality of withheld exculpatory evidence established by *United States v. Agurs*, 427 U.S. 97, 107 (1976), was technically inapplicable to the respondent's case "because Miller was found *not guilty* by reason of insanity." App. at 49A (emphasis in original). Applying *Agurs* to the effect of the State's failure to disclose the Lupinacci information on the proceedings generally, the court concluded that Bundock would have handled the case in the same way even if he had received all of the Lupinacci data in the State's possession. App. at 51A. Leave to appeal to the Connecticut Supreme Court was denied. *Miller v. Anglicker*, 197 Conn. 809, 499 A.2d 59 (1985).

On federal habeas corpus review, the district court agreed that the respondent's ineffective counsel and *Brady* claims were meritless and denied the petition. The court observed that Bundock was aware of the Lupinacci case generally and that his decision to assert the insanity defense was a reasonable trial strategy. App. at 27A.

The Second Circuit reversed solely on due process grounds. App. at 1A. The court analogized the respondent's trial and acquittal by reason of insanity to a guilty plea; discounted as "idiosyncratic" evidence that timely disclosure of the Lupinacci data would not have changed counsel's strategy and advice to the respondent at trial; and found that the undisclosed exculpatory information was "material" within the meaning of *Agurs*. App. at 15A, 25A.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Constitutes An Unprecedented Expansion Of *Brady v. Maryland*, 373 U.S. 83 (1963)

It is well-settled that "[t]he suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (hereinafter *Brady*). The implicit concern of the requirement of materiality, of course, is that the suppressed evidence might have affected the outcome of the trial. Accordingly, the proper standard of materiality "must reflect our overriding concern with the justice of the finding of guilt." *United States v. Agurs*, 427 U.S. 97, 112 (1976) (footnote omitted).

Here, however, there has been no finding of guilt. No punishment has been imposed. Rather, this case presents a respondent who has been tried and *acquitted*, by reason of insanity, and who, in a separate statutory proceeding, has been committed to a mental institution for his own protection and for the protection of society. The difficulty in the application of *Brady* in such circumstances is evident, for any determination of "materiality" must be predicated upon something other than "concern with the justice of the finding of guilt." *United States v. Agurs*, 427 U.S. at 112 (footnote omitted).

This case does not concern the State's duty under *Brady* to disclose exculpatory information to an accused. That duty is not predicated merely upon a finding of guilt but exists even when, as here, an accused is ultimately acquitted by reason of his insanity. But the recognition of this duty does not answer the question posed by this case. It is one thing to acknowledge the duty to disclose, but quite another to apply to an insanity acquittee a materiality standard which is predicated upon a finding of guilt or the imposition of punishment. *Brady v. Maryland*, 373 U.S. at 87. Indeed, the Second Circuit

acknowledged in this case that the applicability of *Brady* to an insanity acquittee "is far from well established." App. at 15A. The court was unable to discover any case in which this question has been explored. App. at 15A.

Given the general acceptance of the insanity defense in murder cases throughout the country, it is likely that this case will spawn habeas corpus litigation by acquittees who, like this respondent, have been committed to a mental institution as a result of their successful insanity defense. This Court should determine the extent to which the materiality standard of *Brady* applies in such cases.

2. The *Brady* Materiality Standard Applied Below Erroneously Disregards The Strategy Of Competent Counsel To Raise An Insanity Defense

A majority of this Court has agreed that "[e]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Pennsylvania v. Ritchie*, 480 U.S. ____, 107 S.Ct. 989, 1001 (1987); quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985); *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

The Second Circuit applied this "reasonable probability" standard by analogizing the respondent's *trial*, in which he pleaded not guilty and successfully raised an insanity defense, to a *plea of guilty*. App. at 17A. This analogy, the court reasoned, flowed from the fact that the respondent had waived important trial rights by asserting an insanity defense, even though, under Connecticut law, "the State still had an obligation to present a prima facie case sufficient to convince the triers of fact beyond a reasonable doubt that the respondent performed the acts alleged." App. at 16A; *see State v. Warren*, 169 Conn. 207, 363 A.2d 91 (1975). The court then

determined that the pivotal inquiry was whether there was a "reasonable probability that but for the withholding of the information the [respondent] would not have entered the recommended plea but would have insisted on going to a full trial." App. at 22A.

The flaw in this analogy lies in its failure to recognize that the decision to assert the insanity defense was made by competent counsel, not the respondent. This strategy was predicated upon the State's agreement to drop two of the murder charges; to present only a prima facie case at trial; and to recommend to the trial court that the insanity defense be accepted. App. at 31A. Consequently, the respondent avoided a possible conviction for five murders and a maximum prison term of 125 years. App. at 32A.

Common sense dictates that such strategic judgments are properly committed to counsel, who is in the best position to decide whether a defense will "disserve the interests of his client"; *United States v. Cronic*, 466 U.S. 648, 656 n. 19 (1984); and whether "practical considerations" warrant a particular plea. *See Tollett v. Henderson*, 411 U.S. 258, 268 (1973). The choice of a trial defense is perhaps the quintessential example of why lawyers in criminal cases "are necessities, not luxuries." *Gideon v. Wainwright*, 287 U.S. 335, 344 (1963).

The Second Circuit, however, attached significance to the voluntariness of the respondent's decision to plead not guilty, rather than the strategy of competent counsel to assert an insanity defense pursuant to that plea. App. at 17A, 25A. Even though counsel's strategy would not have changed even with full knowledge of the undisclosed evidence, the court simply dismissed his professional judgment as "idiosyncratic"; *see Strickland v. Washington*, 466 U.S. at 695; and so avoided the crux of the matter: whether counsel had been reasonably effective in pursuing the insanity defense he elected. *Id.*, at 687-691; *Hill v. Lockhart*, 474 U.S. 52, 60-61 (1985). When, as here, the outcome of a criminal trial has been determined by

such a strategic judgment, the materiality of undisclosed evidence must begin with an objective determination of whether that strategy is within the broad range of effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. at 694–695. By its failure to apply this objective standard, the court below reached a fundamentally flawed result which this Court should correct.

3. The Decision Below Conflicts With Well-Settled Precedents Of This Court

If, as the Second Circuit held, the respondent's trial may be analogized properly to a plea of guilty, its holding conflicts with this Court's standards for federal habeas corpus review of a State prisoner's guilty plea. When a prisoner has pleaded guilty upon the advice of counsel, he must prove more than the existence of an "antecedent constitutional infirmity" such as the *Brady* violation alleged here. *Tollett v. Henderson*, 411 U.S. 258, 266 (1973). The prisoner "may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann [v. Richardson*, 397 U.S. 759 (1970)]." *Id.*, at 267; *Hill v. Lockhart*, 474 U.S. 52, 56–57 (1985).

The court below failed to consider, let alone decide, whether defense counsel was effective in advising the respondent to plead not guilty and assert an insanity defense. App. at 14A. The court did not dispute the finding of every other State and federal court that the respondent had not proven his ineffectiveness claim. App. at 14A. Moreover, there is nothing in the record to indicate that the respondent would have pleaded differently had he known of the undisclosed evidence. *See Hill v. Lockhart*, 474 U.S. at 60. Even under its owned flawed analysis, then, the Court of Appeals has sustained a collateral attack upon a "guilty" plea solely upon a perceived "antecedent constitutional infirmity," a result plainly at odds with *Hill*, *Tollett*, and *McMann*. This Court should grant the writ of certiorari to resolve this conflict.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

COLIN C. ANGLICKER, M.D., DIRECTOR,
WHITING FORENSIC INSTITUTE, Petitioner.

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 630—August Term, 1987

(Argued: January 19, 1988 Decided: May 20, 1988)

Docket No. 87-2355

BENJAMIN F. MILLER, JR.,

Petitioner-Appellant,

—v.—

COLIN C.J. ANGLIKER, M.D.,
Director, Whiting Forensic Institute,

Respondent-Appellee.

Before:

LUMBARD, KEARSE, and PIERCE,

Circuit Judges.

Appeal from a judgment of the United States District Court for the District of Connecticut, Ellen Bree Burns, *Judge*, denying petition for habeas corpus.

Reversed.

JOHN R. WILLIAMS, New Haven, Connecticut (Williams & Wise, New Haven, Connecticut, on the brief), *for Petitioner-Appellant*.

FREDERICK W. FAWCETT, Assistant State's Attorney, Bridgeport, Connecticut, *for Respondent-Appellee*.

KEARSE, *Circuit Judge*:

Petitioner Benjamin F. Miller, Jr. ("Miller"), having been committed to the custody of the Commissioner of Mental Health of the State of Connecticut ("State") in 1973 after being found not guilty of certain murders by reason of insanity, appeals from a judgment of the United States District Court for the District of Connecticut, Ellen Bree Burns, *Judge*, denying his petition for a writ of habeas corpus. Miller contended principally that his confinement resulted from (1) violation of his Sixth Amendment right to the effective assistance of counsel, and (2) violation of his due process right to be provided with exculpatory information in the possession of the State, both of which affected his decision to plead insanity rather than simply not guilty. The district court denied the petition on the grounds that the courses of action followed by Miller's attorney did not constitute ineffective assistance and would not necessarily have been different had the exculpatory information been disclosed to him. On appeal, Miller contends principally that the district court failed to apply the proper legal standard in assessing the materiality of the information withheld by the State. For the reasons below, we agree and, finding merit in the due process contention,

we reverse with instructions that the writ be granted unless the State elects to bring Miller to trial.

I. BACKGROUND

During the period 1967 through 1971, a number of young black prostitutes were found strangled in a wooded area of Stamford, Connecticut, adjacent to the Merritt Parkway. Miller was indicted in 1972 for five such murders. In 1973, pursuant to an agreement between prosecution and defense, two counts were withdrawn, and Miller pleaded not guilty by reason of insanity. The State joined in urging the three-judge panel before which the case was tried to accept the insanity defense, and Miller was found not guilty by reason of insanity.

The constitutional claims pursued on this appeal stem from the fact that, prior to the plea agreement leading to Miller's decision to rest on the insanity defense, the State possessed and did not disclose to Miller evidence that connected another individual, Robert Lupinacci, at pertinent times and places, with at least four of the five women alleged to have been killed by Miller. Lupinacci had been arrested in July 1972 as he was attempting to strangle a black prostitute in the same area in which the other victims had been found.

The following description of the events is taken largely from an October 1983 state court opinion in this matter, which was relied on by the district court.

A. *The Events and the Investigation of Miller*

On August 4, 1967, the body of Rosell ("Sissy") Rush, a young black woman, was found strangled near River Bank Road in a wooded area off the Merritt Parkway in

Stamford. On May 3, 1968, and September 8, 1968, respectively, the similarly strangled bodies of Donna Roberts and Gloria Kahn, also young black women, were discovered in the same area. The crimes were not quickly solved.

Miller, a white postal worker who claimed to be an ordained minister, spent a great deal of his time preaching to blacks on street corners in Stamford, and especially to black women. He had a history of mental illness and had been hospitalized at Fairfield Hills State Hospital ("Fairfield Hills") as early as 1953.

Miller first came to the attention of police investigating the Rush, Roberts, and Kahn murders after a Reverend James Miller (apparently not related to petitioner) of Stamford reported receiving an anonymous telephone call in April 1969 from someone having the voice of a black male, describing the location of an as yet unfound body and expressing a wish that the deceased woman receive "a Christian burial." The investigators then sought to list all Millers who were clergymen in the area, and they included Miller's name among them. After three more bodies were discovered, they invited Miller to be interviewed. They apparently did nothing to pursue him, however, when Miller responded that he was too busy with church work to be interviewed.

On July 10 and August 22, 1971, the strangled bodies of Gail Thompson and Alma Henry, respectively, were found in the same area where the bodies of Rush, Roberts, and Kahn had been found. There had been a substantial amount of publicity in the Stamford area with respect to the series of killings, and the black community and other groups had expressed anger at the lack of any progress in solving the murders. By January 1972, a special team of

state and local police detectives had been assigned to the cases on a full-time basis. These investigators began to follow up the earlier mention of Miller and learned of his psychiatric history and his contacts with black women.

Over the course of the next few weeks, the detectives interrogated Miller several times and at length. Miller denied that he had committed the murders but admitted having "had sexual relations with Gail Thompson in [his] car in North Stamford." Though the autopsy report on Thompson did not reveal recent sexual intercourse, certain of Miller's other statements accurately recited theretofore unpublished information related to the murders. For example, when the detectives showed Miller a picture of the body of Thompson and asked what he thought was around her neck, Miller responded, correctly, that it was a handkerchief; the public information was that Thompson had been strangled with a brassiere. A polygraph test of Miller's denial that he had committed the murders proved inconclusive, apparently because of his erratic behavior.

During an interrogation session on February 16, 1972, the detectives suggested that Miller speak with Dr. Robert Miller (apparently not related to petitioner), a psychiatrist at Fairfield Hills whom the investigators had consulted with regard to Miller in January. Miller refused to see Dr. Miller but agreed to see Dr. Shirley Williams, a psychiatrist he had consulted previously, at Norwalk Hospital. After Miller was seen by Dr. Williams and another psychiatrist, he was involuntarily committed to Fairfield Hills. Upon his admission to that hospital, Miller was found to be suffering from chronic undifferentiated schizophrenia. He was placed on suicide watch at times and was regularly administered medication. The hospital records indicated that "he is delusional, religosity [*sic*] is in evidence, low

self-esteem, flat affect, thought disorders, poor judgment and insight."

During his stay at Fairfield Hills, Miller was interviewed a number of times by Dr. Robert Miller. As a result of these sessions, Dr. Miller told the investigators he believed Miller had committed the murders and encouraged them to continue investigating Miller. On February 29, Dr. Miller called the detectives and reported that Miller wished to speak with them.

After the detectives arrived at Fairfield Hills on February 29 and advised Miller of his rights, Miller wrote on a pad that he had killed seven women. He later stated that he had killed Thompson, Henry, Rush, and others he could not remember. He described the murder of Thompson in detail and made a more general statement about killing three others. On March 1, Miller signed typed versions of the statements he had made on February 29, and he accompanied the detectives to the area where the bodies had been found. He reenacted the Thompson murder and led them to the spots where three other bodies had been found.

On March 2, Miller signed a detailed statement admitting the murder of Henry. On that day he accompanied the officers to the Merritt Parkway and pointed out the spot where Henry's body had been found. On March 10, Miller signed a detailed statement admitting the murder of Roberts. At various times he also signed statements describing his trips with the officers to the scene of the murders.

Miller was placed under arrest on March 17, 1972, and on May 15, he was indicted for the murders of Rush, Roberts, Kahn, Thompson, and Henry.

B. *The Preparation of Miller's Defense*

Upon Miller's arraignment, Herbert J. Bundock, a public defender in Fairfield County since 1962, was appointed by the court to represent him. Joseph T. Gormley, Jr., the State's attorney in charge of the prosecution, informed Bundock that Dr. Robert Miller believed Miller could be found not guilty by reason of insanity. Gormley stated that if Miller would agree to plead insanity, the State would present only a prima facie case.

Bundock interviewed Miller, Miller's father ("Miller Sr.") and Dr. Williams, and reviewed Miller's psychiatric records. Miller Sr. told Bundock that Miller had telephoned Miller Sr. in February and said he had signed a confession but that he was sick and would have signed anything.

Miller told Bundock that during the first several interrogations, the investigators had repeatedly tried to get him to confess to the murders, but that Miller had denied killing the women. He said Dr. Robert Miller too had tried to get him to confess and had shown him a statement that he could sign in order to plead not guilty by reason of temporary insanity, but that his response was to ask Dr. Miller whether the latter "want[ed Miller] to . . . confess to something I didn't do." Miller stated that he had eventually confessed while under the influence of the medication given him and that Dr. Miller and another doctor had broken him down. Bundock did not interview Dr. Miller or anyone else on the staff of Fairfield Hills.

Miller told Bundock he had given the confessions on February 29, March 2, and March 10 because he was frightened and was afraid of receiving a beating, and because the detectives told him that unless he confessed he would lose his job and his family would suffer. He was

also concerned that, because he had admitted adulterous conduct with black women, the police would arrest him for adultery and his wife would divorce him. He told Bundock that the detectives had asked him leading questions and he merely gave them the right answers. They had shown him pictures of the murder scenes many times; when they drove him to the site of the murders and asked him if they were in the right place, he had said "I think so" to please them.

Bundock had Miller evaluated by a court-appointed psychiatrist and in mid-December 1973 received a report. The report stated that although it was certain that Miller "is and has been chronically psychotic and delusional and totally incapable of discerning right from wrong," and that "[t]he force of his insanity drove him into the midst of the daily life of the people he is accused of having murdered," the psychiatrist had "no certain idea" whether Miller had actually committed the murders.

C. *Robert Lupinacci*

Shortly after Bundock commenced the preparation of Miller's defense, the police arrested Robert Lupinacci on July 29, 1972, as he was attempting to strangle a black prostitute in the same area in which Miller's alleged victims had been found. Thereafter, Miller Sr. sent Bundock a packet of clippings and ideas for investigation, including articles that described the arrest of Lupinacci and indicated that the investigation of all the murders might be reopened. Bundock, convinced that Miller's confessions revealed details that he would have known only if he were the killer, did not investigate the possibility that Miller did not commit the murders and did not pursue any investigation regarding Lupinacci.

The State's file on Lupinacci, which is included in the present record, included the following information. Lupinacci was considered a "sex nut," was known to patronize black prostitutes, and referred to blacks disparagingly. The bodies of three of the women allegedly killed by Miller had been found within 100 feet of the spot where Lupinacci was arrested; Lupinacci's car had been seen near the murder scenes several times. In addition, in 1967, Lupinacci had been seen in bars in the vicinity of Port Chester, New York, which is near Stamford; Rush, just prior to her death in 1967, also had frequented bars in Port Chester. In 1968, employees at the Hotel Hazelton had seen Lupinacci there; Kahn, killed in 1968, was a resident of that hotel. Lupinacci had been seen cruising the Stamford area on the night Kahn was killed. In 1971, Lupinacci worked at a motel at which Thompson, killed in 1971, resided. Lupinacci was known to sell pornographic playing cards, and in the trunk of his car police found a pornographic deck with the queen of hearts missing; a similar card had been found near Thompson's body. Thompson was last seen alive in a vehicle resembling Lupinacci's car, and such a vehicle was seen near the scene of Thompson's murder. A vacuum sweeping of the trunk of Lupinacci's car revealed negroid limb hairs. In August 1971, Henry was last seen alive on Grey Rocks Place in Stamford. Lupinacci was a member of a club then located on Grey Rocks Place.

A local police officer reported that during the investigations of the deaths of Thompson and Henry, Lupinacci had inquired about the location and duration of police stakeouts related to those investigations. In addition, Lupinacci had commented that not all of the victims had been strangled with brassieres, a fact that was not known to the public.

Because of the similarity between the crimes of which Miller was accused and the act in which Lupinacci was caught, the detectives who investigated Lupinacci turned over complete reports of the information gathered to Gormley. In June 1972, Bundock had moved for the production of all exculpatory information in the possession of the prosecution. Gormley, agreeing that Bundock could have free access to the State's file on Miller, never formally responded to Bundock's request. The State did not offer access to its file on Lupinacci and never turned over to Bundock any of its information on Lupinacci.

D. *The Trial*

Sometime after the arrest of Lupinacci and before receiving the report of the court-appointed psychiatrist, Bundock negotiated a plea bargain with Gormley pursuant to which two of the murder counts would be dropped and Miller would enter an insanity defense on the remaining counts. Accordingly, in January 1973, the State withdrew the charges with regard to Rush and Kahn, and Miller pleaded not guilty by reason of insanity on the charges that he had killed Roberts, Thompson, and Henry.

A one-day trial on the three remaining charges against Miller was held before a three-judge panel of the Connecticut Superior Court for Fairfield County. Under Connecticut law, the trier of fact may not enter a verdict of not guilty by reason of insanity unless it finds beyond a reasonable doubt that the defendant has in fact committed the acts with which he is charged. *See State v. Warren*, 169 Conn. 207, 363 A.2d 91 (1975). Accordingly, at the trial, the State presented a prima facie case, which consisted primarily of Miller's confessions. Miller presented his insanity defense through the testimony of Dr. Robert Miller and Miller's court-appointed psychiatrist. Both Gormley and

Bundock urged the court to accept the insanity defense. The court, after a brief recess, found Miller not guilty by reason of insanity.

In March 1973, pursuant to Conn. Gen. Stat. Ann. § 53a-47 (West 1972) (*repealed by* 1985 Conn. Acts 506, § 31), the panel held a hearing to determine whether Miller's current mental state warranted his confinement in a mental hospital. The court found it established by a preponderance of the evidence, *see id.* § 53a-47(a)(4), that Miller was currently mentally ill to such an extent that he posed a danger to himself and to others. Accordingly, the court committed him to the custody of the commissioner of mental health for a term of confinement not to exceed 25 years. Miller has remained so confined since 1973.

E. *The Habeas Proceedings*

In 1982, Miller sought habeas relief in state court, contending principally (1) that Bundock's failure to pursue the Lupinacci line of inquiry and certain other procedural strategies, such as a motion to suppress the confessions, violated his right under the Sixth Amendment to the effective assistance of counsel, and (2) that the State's failure to turn over to Bundock its file on Lupinacci violated his due process right to be given any exculpatory information in the possession of the prosecution, *see Brady v. Maryland*, 373 U.S. 83 (1963). After an eight-day evidentiary hearing at which Bundock, Gormley, and others testified, the court made exhaustive findings of fact and denied relief. (*See* Memorandum of Decision Re: Petition for Writ of Habeas Corpus ("State Habeas Court Decision") dated October 13, 1983.)

In assessing Miller's claims, the court expressed "substantial doubt" as to whether the Lupinacci information

possessed by the State would have been admissible at trial, noting that " '[o]rdinarily, evidence concerning a third party's involvement is not admissible until there is some evidence which directly connects that third party with the crime.' . . . '[I]t is within the sound discretion of the trial court to refuse to admit such evidence when it simply affords a possible ground of possible suspicion against another person.' " (State Habeas Court Decision at 44 (quoting *State v. Kinsey*, 173 Conn. 344, 348, 377 A.2d 1095, 1097 (1977), and *State v. Renteria*, 21 Ariz. App. 403, 404, 520 P.2d 316, 317 (1974), *quoted in State v. Giguere*, 184 Conn. 400, 405, 439 A.2d 1040, 1043 (1981)).) The court rejected Miller's claim of ineffective assistance of counsel because it concluded that Bundock's performance had not been ineffective, in that Bundock had acquired sufficient information to make an informed recommendation to Miller. The court rejected Miller's claim under *Brady v. Maryland* on the ground that "the information in the hands of the State's Attorney was [not] sufficient to create a reasonable doubt that did not otherwise exist." (State Habeas Court Decision at 38.) It apparently believed that the withheld information showed "mere[ ] similarities in crimes committed by two different individuals" (*id.*), that the information was not proper *Brady* material, and that the public information available to Bundock had "provided the defendant with an opportunity to discover the information he now alleges the prosecutor suppressed" (*id.*).

The court also ruled that Miller was not entitled to attack alleged constitutional deprivations that occurred prior to his January 1973 trial, reasoning, in effect, that Miller was not aggrieved by the events leading to that trial because "[h]e was acquitted." (*Id.* at 30.) The court viewed the habeas petition as an improper attack on Mil-

ler's confinement because his commitment on the ground that he was a danger to himself and others resulted from a proceeding that (a) was separate from the trial at which he was found not guilty by reason of insanity, and (b) focused on his mental state in 1973 rather than on his mental capacity at the times of the killings. Noting that Miller had not appealed from the March 1973 order of confinement, the court ruled that he was barred from presenting his claims by way of his habeas corpus petition.

The Connecticut Court of Appeals rejected the habeas court's view that Miller was barred from pursuing his habeas claims, but, endorsing its findings of historical fact, affirmed the denial of the writ on the merits. 4 Conn. App. 406, 494 A.2d 1226 (1985). As to the *Brady v. Maryland* claim, the appellate court found that the Lupinacci evidence was "clearly" and "obvious[ly]" exculpatory of Miller, *id.* at 421 n.4, 494 A.2d at 1235 n.4; but it believed that the test as to the materiality of withheld exculpatory evidence established by *United States v. Agurs*, 427 U.S. 97, 107 (1976), was not technically applicable to Miller's case "because Miller was found *not guilty* by reason of insanity," 4 Conn. App. at 421, 494 A.2d at 1236 (emphasis in original). Applying more general principles, the court stated that the pertinent question was

> whether it is reasonably certain that the contents of the Lupinacci file should have caused Bundock to change his mind about his decision to recommend that Miller adopt an insanity plea, and that, had he done so, upon a trial after a plea of not guilty, a reasonable doubt would have been created by the Lupinacci material.

Id. Concluding that Bundock would have handled the case in the same way even if he had received all of the Lu-

pinacci data in the State's possession, the court found no error in the denial of the writ. Leave to appeal to the Connecticut Supreme Court was denied. 197 Conn. 809, 499 A.2d 59 (1985).

In 1986, Miller filed his present petition for habeas corpus in the district court pursuant to 28 U.S.C. § 2254 (1982), pursuing his *Brady v. Maryland* claim and his claim of ineffective assistance of counsel. The district court, pursuant to § 2254(d), deferred to the findings of fact made by the state courts. It agreed with the standard of materiality applied by the state appellate court (*see* Ruling on Petition for Writ of Habeas Corpus dated July 28, 1987, at 11 n.2), and with that court's conclusion that Miller had "failed to prove that the outcome of the proceedings in the instant case would have been different if the prosecutor disclosed evidence relating to the Lupinacci case," *id.* at 9. Judgment was entered denying the writ, and this appeal followed.

For the reasons below, we conclude that the writ should have been granted on the basis of Miller's *Brady v. Maryland* claim. We therefore need not reach the claim of ineffective assistance of counsel.

II. DISCUSSION

In challenging the district court's rejection of his *Brady v. Maryland* claim, Miller argues that the court did not apply the correct test for evaluating the materiality of the withheld information. Both the district court and the state appellate court focused solely on whether Miller's attorney would have pursued a different strategy had he been given the Lupinacci information; and both found that Miller had not proved that the outcome of the proceedings

"would" have been different if the Lupinacci information had been disclosed. Miller contends (1) that these courts applied an unduly burdensome test of materiality, and (2) that the courts should have focused not just on Bundock's likely recommendation following disclosure but also on whether Miller himself would likely have agreed to plead insanity. We agree with both contentions.

A. *The Applicability of* Brady v. Maryland *and Its Progeny to A Plea of Not Guilty By Reason of Insanity*

It is by now well established that a person accused of a crime has a due process right to require the prosecution to turn over to him any material exculpatory evidence in its possession. "The suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. at 87. The applicability of this principle to proceedings in which the defendant has pleaded not guilty by reason of insanity, however, is far from well established. Indeed, we are unaware of any case prior to Miller's state court habeas proceeding in which this question has been explored. For the reasons below, we think the most analogous principles on which we may draw are those applicable to proceedings in which the accused has entered a plea of guilty.

When a defendant pleads guilty, he waives several federal constitutional rights, including the right to confront his accusers and the privilege against compulsory self-incrimination. *See Boykin v. Alabama*, 395 U.S. 238, 243 (1969). A plea of not guilty by reason of insanity resembles the plea of guilty in several significant respects, as it waives important trial rights belonging to the defendant, including his right to argue that he did not perform the

acts with which he is charged, his right to urge through cross-examination of the State's witnesses that his confessions were not voluntary, and his right to introduce any other evidence tending to create a doubt that he actually performed the acts charged. Thus, Bundock testified that "when you go on the insanity defense, you admit the crime, but deny that your client was capable of committing it because of mental infirmity" (State Habeas Hearing Transcript, December 16, 1982, at 150-51); "when you pursue that course, you're admitting that he did it" (*id.*, December 21, 1982, at 38). Similarly, Gormley testified that his agreement with Bundock was to "allow the State to put its case on as briefly as possible," and that there generally would be "no cross-examination or any contest with the facts presented by the State." (*Id.*, December 16, 1982, at 33.) Accordingly, the state habeas court observed that "[s]ince his client had elected the plea of not guilty by reason of insanity Mr. Bundock did not, of course, while on trial attempt to throw suspicion upon Mr. Lupinacci." (State Habeas Court Decision at 27.)

On the other hand, under Connecticut law, the plea of not guilty by reason of insanity differs from a plea of guilty in that the State still has an obligation to present a prima facie case sufficient to convince the triers of fact beyond a reasonable doubt that the defendant performed the acts alleged. *See State v. Warren*, 363 A.2d at 96. Nonetheless, it is plain that the insanity plea is more like a plea of guilty than it is like a plea of not guilty since, while not relieving the State of all burden to prove that the defendant performed the acts charged, the insanity plea lessens that burden considerably as a practical matter by barring the defendant from contesting or impeaching the State's proof and from presenting other evidence that could

counter that proof. Accordingly, we turn to principles pertaining to pleas of guilty.

In the absence of special circumstances, the validity of a plea of guilty is determined by reference to whether it was intelligent and voluntary. *Brady v. United States*, 397 U.S. 742 (1970); *Boykin v. Alabama*, 395 U.S. 238. As a general matter, a plea is deemed "intelligent" if the accused had the advice of counsel and understood the consequences of his plea, even if only in a fairly rudimentary way; it is deemed "voluntary" if it is not the product of actual or threatened physical harm, mental coercion overbearing the defendant's will, or the defendant's sheer inability to weigh his options rationally. *See Brady v. United States*, 397 U.S. at 750. The *Brady v. United States* Court made clear, however, that this test suffices only in the "absen[ce of] misrepresentation or other impermissible conduct by state agents." *Id.* at 757. Since a defendant's decision whether or not to plead guilty is often heavily influenced by his appraisal of the prosecution's case, *id.* at 756, and of information that may be available to cast doubt on the fact or degree of his culpability, we conclude that even a guilty plea that was "knowing" and "intelligent" may be vulnerable to challenge if it was entered without knowledge of material evidence withheld by the prosecution.

Given the practical similarities between guilty pleas and pleas of not guilty by reason of insanity, and the influence that exculpatory material may have on the accused's decision whether to plead insanity rather than not guilty, we conclude that the *Brady v. Maryland* principles are also applicable where the defendant has pleaded not guilty by reason of insanity.

B. *The Degree of Certainty Required To Establish* Brady v. Maryland *Materiality*

A person who claims that exculpatory information has been withheld from him by the prosecution in violation of his due process rights as explicated in *Brady v. Maryland* is entitled to relief only if the withheld information was "material." Evidence is "material" in this context " 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *Pennsylvania v. Ritchie*, 107 S. Ct. 989, 1001 (1987) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, *J.*)); *see also United States v. Bagley*, 473 U.S. at 685 (opinion of White, *J.*). This concept of materiality applies whether the accused has made a precise request for the material that was withheld, or only a general request for any exculpatory material, or no request at all. *United States v. Bagley*, 473 U.S. at 682-83 (opinion of Blackmun, *J.*); *id.* at 685 (opinion of White, *J.*).

In *United States v. Agurs*, the Supreme Court ruled that evidence that "creates a reasonable doubt that did not otherwise exist" as to the defendant's guilt must be considered material. 427 U.S. at 112. But "[t]his formulation does not mean that the defendant must be able to show that the evidence *would 'probably* lead to an acquittal,' which is the standard that must be met for the granting of a new trial on the basis of newly discovered evidence from a source other than the government . . . ." *United States v. Srulowitz*, 785 F.2d 382, 388 (2d Cir. 1986) (emphasis added). Rather, as the Court has made clear, a "reasonable" probability suffices, and " '[a] "reasonable probability" is a probability sufficient to undermine confidence in the outcome' " of the case. *Pennsylvania v. Ritchie*,

107 S. Ct. at 1001 (quoting *United States v. Bagley*, 473 U.S. at 682 (opinion of Blackmun, *J.*, quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984))).

Neither the state courts nor the district court applied this standard. The state appellate court instead required Miller to show to a "reasonable certain[ty]" that disclosure would have produced a different outcome. The district court stated its agreement with the standard adopted by the state appellate court and rejected Miller's claim because he had failed to prove that the outcome of the proceedings "would have been different."

The courts' rationale for their use of the "reasonable certain[ty]" test was that Miller had not been found guilty but had been found not guilty. Their reasoning suggested that Miller was not disadvantaged by the State's pretrial withholding of evidence and/or that his confinement was unrelated to the events that preceded his trial. We disagree. In fact, Miller has been in custody since 1973, committed pursuant to a court order finding by a simple preponderance of the evidence that he was a danger to himself and others. The preponderance standard was applicable because Miller had successfully invoked the insanity defense. *See* Conn. Gen. Stat. Ann. § 53a-47 (repealed 1985). Had Miller pleaded not guilty and been acquitted, he would have had a due process right not to be committed involuntarily unless his dangerousness was established by clear and convincing evidence. *See Addington v. Texas*, 441 U.S. 418, 432-33 (1979) ("[t]o meet due process demands . . . the proof [supporting involuntary commitment] must be greater than the preponderance-of-the-evidence standard . . ."); *see generally Warren v. Harvey*, 472 F. Supp. 1061, 1068-72 (D. Conn. 1979), *aff'd*, 632 F.2d 925 (2d Cir.), *cert. denied*, 449 U.S. 902

(1980); *cf.* Conn. Gen. Stat. Ann. § 17-178(c) (West Supp. 1988) (adopting "clear and convincing" standard). Further, once Miller was found not guilty only by reason of insanity, the subsidiary finding that he had committed the acts attributed to him would be considered as "substantial" evidence of his likely dangerousness in the future. *See Warren v. Harvey*, 632 F.2d at 934. Since, in order for Miller to be found not guilty by reason of insanity, and hence subject to confinement under a mere preponderance standard, the State was required to prove beyond a reasonable doubt that he performed the acts attributed to him, Miller is entitled to challenge the State's withholding of evidence that would have cast doubt on that question and that could have affected his decision to plead insanity and waive his right to contest the State's proof.

We conclude that the standards of materiality established by *Brady*, *Agurs*, *Bagley*, and *Ritchie* are applicable to Miller's claim.

C. *The Materiality of the Withheld Evidence*

There is no question in this case that the State withheld the results of its Lupinacci investigation from Miller and Bundock. Both state courts so found. Nor can there be any question that the information gathered was favorable to Miller, in that it suggested that the murders might have been committed by Lupinacci rather than Miller. Indeed, the state appellate court found that the Lupinacci materials were "clearly" and "obvious[ly]" exculpatory of Miller. Thus, the only issue in the present case is whether there is a reasonable probability that disclosure of those materials would have affected the outcome of the proceedings, *i.e.*, whether they are sufficient to shake one's confidence in the outcome of the Miller proceedings.

In seeking to state in somewhat more concrete terms this "reasonable probability" test of materiality as it would apply to the entry of an insanity plea after the prosecution has withheld exculpatory evidence, we note that the Supreme Court has considered the concept of materiality (or "prejudice" to the defendant) to be the same for claims of withheld evidence as for claims of ineffective assistance of counsel. *See, e.g., Strickland v. Washington*, 466 U.S. at 694 (test for "prejudice" stemming from error of counsel "finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution"); *United States v. Bagley*, 473 U.S. at 682 (opinion of Blackmun, *J.*, using the "*Strickland* formulation" in case involving withheld evidence); *Pennsylvania v. Ritchie*, 107 S. Ct. at 1001 (a withheld-evidence case adopting Justice Blackmun's *Bagley* formulation which included *Strickland*'s "sufficient to undermine confidence in the outcome" test). Accordingly, given the parallel standards and the similarities between a plea of guilty and a plea of not guilty by reason of insanity, we consider it useful in the present case to look to the Supreme Court's discussion of materiality in *Hill v. Lockhart*, 474 U.S. 52 (1985), which involved a claim that the defendant's decision to enter a plea of guilty was caused by the ineffective assistance of his counsel.

In *Hill v. Lockhart*, the Court's bottom-line test to determine whether flaws in the performance of counsel were material was stated as follows: "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59. As an illustration, the Court indicated that the defendant might meet this test if

error-free representation would likely have led counsel to recommend a plea of not guilty:

> For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial.

Id.

In assessing the materiality of the withheld information in the present case, the state appellate court and the district court focused solely on whether disclosure of the Lupinacci information would have affected Bundock's recommendation to Miller. The plea context, however, requires the broader focus manifested in *Hill*'s bottom-line formulation, for the right to decide whether to plead guilty, or not guilty, or not guilty by reason of insanity belongs to the defendant, not to counsel. Counsel indeed recommends, and if disclosure would likely have caused him to alter his recommendation, that likelihood will usually suffice to show materiality. But whatever counsel recommends, it is the accused who must decide. Thus, we conclude that even where counsel would likely adhere to his recommendation of a plea of guilty or not guilty by reason of insanity, if there is a reasonable probability that but for the withholding of the information the accused would not have entered the recommended plea but would have insisted on going to a full trial, the withheld information is

material within the meaning of the *Brady v. Maryland* line of cases.

In assessing the likelihood that either the recommendation of counsel or the decision by the accused would have been different if the prosecution had not withheld the exculpatory evidence, the test is an objective one, depending largely on the likely persuasiveness of the withheld information. We have detailed the evidence possessed by the State as to Lupinacci in some detail in Part I.C. above. The State's file included information that Lupinacci was a "sex nut" who patronized black prostitutes but despised blacks; that he had, at pertinent times spanning four years, frequented places where at least four of the five women Miller was charged with killing frequented or resided; that he had cruised the area from which Kahn disappeared on the night she was murdered; that Henry was last seen on the street of Lupinacci's club; that Thompson was last seen in a car resembling Lupinacci's and that a similar car had been seen near the murder site on that night; that Lupinacci's car had been seen near the murder sites several times; that negroid limb hairs were found in the trunk of Lupinacci's car; that a deck of pornographic playing cards found in Lupinacci's trunk was missing a card and that a similar card had been found near Thompson's body; and that Lupinacci knew nonpublic facts about the murders.

There is no doubt that the insanity plea, unlike a plea of not guilty, offered the possibility that Miller could escape having convictions on his record and perhaps even escape further confinement altogether if the state could not prove that he was currently a danger to himself or to others. But when the undisclosed facts possessed by the prosecution are added to the fact that Lupinacci was arrested in the act of attempting to strangle a black prostitute in the very area

where the other victims had been found strangled, we conclude that the withheld information is sufficient to undermine confidence in the outcome of both Miller's decision to forgo any challenge to the State's assertion that he was the murderer and the decision of a rational factfinder as to whether the identity of Miller as the murderer was established beyond a reasonable doubt.

In sum, we conclude that the withheld information was material within the meaning of the *Brady v. Maryland* line of cases.

Three other facets of the prior rejections of Miller's *Brady* claim deserve mention. First, the state habeas court indicated that it could not conclude that the withheld information was sufficient to create a reasonable doubt because the State possessed additional evidence that it had forgone presenting in light of the insanity plea agreement. We believe the State is not entitled to seek to minimize the materiality of the withheld information by arguing that it could have produced additional evidence at a fuller trial. Having avoided the need to make a full presentation by means of a plea agreement that immunized its presentation from attack, and having achieved the plea agreement only after withholding information that would have put teeth in the attack, the State should not be allowed to becloud the court's already hypothetical analysis of the likely effect of the withheld information by adverting to other evidence it *might* have adduced had it not procured the plea agreement.

Second, both the state appellate court and the district court appear to have rested their rejection of Miller's *Brady v. Maryland* claim on a finding that Bundock's own recommendation would not have changed had he known the contents of the State's Lupinacci file. We are skeptical

of the validity of such an individualized inquiry. The question whether there is a reasonable probability that counsel's recommendation would have been different had the information been disclosed is not a question of historical fact but rather a mixed question of fact and law resting on an objective evaluation as to the likely persuasiveness of the information. *See Kimmelman v. Morrison*, 106 S. Ct. 2574, 2590 (1986); *Strickland v. Washington*, 466 U.S. 668. Given the nature of the question and the clear directions in *Hill* and *Strickland* that the likely outcome of a trial should be assessed "objectively, without regard for the 'idiosyncracies of the particular decisionmaker,' " *Hill v. Lockhart*, 474 U.S. at 60-61 (quoting *Strickland v. Washington*, 466 U.S. at 695), the habeas courts should have made an objective evaluation of the likely impact that the withheld information would have had on typically competent counsel, rather than make what appears to be a retrospective finding as to what the effect would actually have been on Bundock, who relied on his surely idiosyncratic view that the Lupinacci facts were "not relevant" because acts like the one in which Lupinacci was caught "happen[ ] every day on the Merritt Parkway" (State Habeas Hearing Transcript, December 16, 1982, at 140-41).

Finally, the state habeas court's doubt as to the admissibility of the Lupinacci information under state-law evidentiary principles was unwarranted. As the state appellate court ruled, the Lupinacci information was plainly relevant to the question of who committed the murders. Given a defendant's Sixth Amendment right to present evidence in his favor, *see Taylor v. Illinois*, 108 S. Ct. 646, 652 (1988) (" 'at a minimum, . . . criminal defendants have . . . the right to put before a jury evidence that might influence the determination of guilt' " (quoting *Pennsylvania v. Ritchie*, 107 S. Ct. at 1001)), and his Fifth

Amendment right not to be deprived of his liberty without due process, we have little doubt that the Lupinacci evidence would have been admissible. Connecticut law does not appear to be to the contrary, *see State v. Bryant*, 202 Conn. 676, 688, 523 A.2d 451, 458 (1987) (assuming relevance, "[i]t is always competent for a [defendant] to [present] evidence tending to show that another committed the crime [with] which he is charged") (brackets in original; quoting other Connecticut cases); and state law could not, in any event, diminish Miller's federal constitutional rights.

CONCLUSION

For the reasons above, we conclude that Miller's claim under *Brady v. Maryland* has merit. Accordingly, we reverse the judgment of the district court dismissing Miller's petition and remand for entry of a judgment conditionally granting the writ. The judgment should provide that the writ will be granted unless within a reasonable time the State brings Miller to trial.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

BENJAMIN F. MILLER, JR. :

v. : CIVIL NO. N-86-89(EBB)

COLIN C.J. ANGLICKER, M.D. :

RULING ON PETITION FOR WRIT OF HABEAS CORPUS

The petitioner in this habeas action was committed to the custody of the State of Connecticut Department of Mental Health in March, 1973, following an acquittal by reason of insanity with respect to three murder charges in Connecticut Superior Court. In January, 1982, petitioner filed a habeas corpus action in state superior court alleging essentially that he was denied effective assistance of counsel at the trial on the charges and that the prosecution improperly withheld exculpatory information. The superior court denied the petition and the Connecticut Appellate Court sustained the lower court's ruling. *See Miller v. Anglicker,* 4 Conn. App. 406 (1985). On September 24, 1985, the Connecticut Supreme Court denied a petition for certification of appeal. *Miller v. Anglicker,* 197 Conn. 809 (1985). Petitioner then filed this action pursuant to 28 U.S.C. § 2241 raising primarily the same issues addressed by the state courts. For the reasons discussed below, the petition must be denied.

A. **Facts**

The state superior court in the habeas action made extensive factual findings relative to petitioner's claims. The appellate court reiterated and augmented the factual findings. *See Miller v. Anglicker,* 4 Conn. App. at 417. Under 28 U.S.C. § 2254(d), there is a presumption that findings of fact made by the state court after a full and fair hearing at which the

material facts were adequately developed are correct. *See Sumner v. Mata*, 455 U.S. 591, 597 (1981); *Matusiak v. Kelly*, 786 F.2d 536, 543 (2d Cir. 1986). Unless a petitioner challenges the factual findings on the grounds enumerated in § 2254(d)(1)-(8), or the record as a whole does not support the factual findings, *see Matusiak*, 786 F.2d at 543, a federal habeas court must give deference to the findings of fact made by the state court. Of course, this court "may give different weight to the facts as found by the state court and may reach a different conclusion in light of the legal standard." *Sumner*, 455 U.S. at 597.

Petitioner does not appear to dispute any of the factual findings made by the state courts and has not invoked any of the provisions of §§ 2254(d)(1)-(8). This court, having reviewed those findings and the entire record, concludes that the statutory presumption applies and believes that it is unnecessary to restate all of the factual circumstances underlying petitioner's claims. Accordingly, petitioner's legal claims of constitutional error will be considered in light of the factual findings made by both the superior court and the appellate court. *See Sumner v. Mata*, 449 U.S. 539, 545-46 (1980).

B. **Ineffective Assistance of Counsel**

Petitioner claims that he was denied effective assistance of counsel at the trial on the murder charges which resulted in a determination by a three-judge court that petitioner was not guilty by reason of insanity. Petitioner's claim in this regard is summarized in his allegation that his court-appointed counsel failed "to conduct a reasonable investigation." More specifically, petitioner argues that his counsel hastily decided to pursue an insanity defense without considering the effect of a pending investigation which petitioner maintains tended to demonstrate that petitioner had not committed the murders, and without testing the validity of confessions made by petitioner to law enforcement officials.

The record reveals that in 1972, Stamford, Connecticut, police began an investigation of petitioner in connection with the murders of five black prostitutes. Petitioner was initially interviewed by police at the beginning of the investigation. In the course of the investigation, petitioner was involuntarily committed to Fairfield Hills State Hospital. Based on information given to police by a psychiatrist at Fairfield Hills, a number of additional interviews were conducted. On February 29, 1972, petitioner provided a handwritten confession indicating that he had murdered seven women. Other handwritten confessions were given on March 1, 1972, and March 10, 1972. The confessions described the murders in great detail and corresponded to physical findings made by investigators at the scene of the murders. Petitioner voluntarily led investigators to the murder scenes and the places where the bodies were left. Each statement given by petitioner contained a handwritten acknowledgement of his rights. The police investigators testified that the confessions were entirely voluntary and were made after full *Miranda* warnings were given to petitioner. Petitioner was receiving psychiatric medication at the time of the confessions. His father told petitioner's counsel that petitioner was "sick" at the time the statements were given and that the police coerced petitioner into confessing. Defense counsel did not file a motion to suppress the confessions.

The record further reveals that on July 29, 1972, after petitioner had been indicted for the murders of the five black prostitutes, Robert Lupinacci was apprehended in the act of committing a similar crime. Lupinacci had previously expressed an interest in the murder investigation to the Stamford police and was aware of facts relative to the murders which were not known to the general public. The murder investigation was reopened in light of Lupinacci's arrest. This fact was reported in the local newspapers. Petitioner's father prepared a scrapbook of newspaper articles about the Lupinacci case and showed it to petitioner's counsel. Petitioner's counsel did not ask the State for the Lupinacci file and did not ask the prosecutor about the status of the case.

Petitioner argues that an investigation of the Lupinacci case would have revealed that Lupinacci was a regular patron of Stamford prostitutes and his car had been seen in the area of the murders on prior occasions. On the night of Lupinacci's arrest, a deck of pornographic playing cards was found in the trunk of his car. One card was missing from the deck and a similar card had been found at the scene of one of the murders. Also, what was described as a "negroid limb hair" was found in the trunk. Lupinacci was described as a "sex nut" who had previously been charged with rape. Eventually, Lupinacci was charged only with assault relative to the July 29, 1972, incident. It was concluded by police investigators that there was no solid evidence linking Lupinacci to the murders with which petitioner was charged.

Petitioner's ineffective assistance claim must be considered in light of the standard announced by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Tsirizotakis v. LeFevre*, 736 F.2d 57 (2d Cir. 1984). Under the *Strickland* standard, petitioner must first establish that his counsel made an error that could not be considered within the realm of reasonable professional competence. In this regard, petitioner must demonstrate that "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Petitioner also has the burden of proving that the error was "so serious as to deprive the defendant of a fair trial." *Id.* at 692. This second element requires the petitioner to demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is one "sufficient to undermine confidence in the outcome" of the proceeding, and must be assessed in view of "the totality of the evidence before the judge or jury." *Id.* As the Connecticut Appellate Court noted, the actions of petitioner's trial counsel must also be considered in light of the agreement made between the prosecutor and defense counsel regarding the insanity plea. *Miller v. Anglicker*, 4 Conn. App. at 419. Defense counsel agreed that petitioner would plead not guilty by reason of insanity and the

prosecutor agreed to present only a prima facie case on three of the murder counts.

Petitioner argues that his counsel improperly failed to seek suppression of the confessions made by petitioner to police officers who were investigating the murders. Petitioner maintains that he was taking a variety of psychiatric medications at the time the statements were made and he suggests that the statements were coerced. As the Connecticut Superior Court noted, "[t]he petitioner presents his case as if it was self evident or a foregone conclusion that a motion to suppress the confessions would have been upheld." *Miller v. Anglicker*, No. 36555, slip op. at 43 (Conn. Super. Ct. Oct. 13, 1983). The record, however, indicates that petitioner was given full *Miranda* warnings before any statements were made to police investigators. In making the confessions, petitioner provided detailed factual descriptions of the murders which were not known to the general public. In these circumstances, it cannot automatically be assumed that the statements would have been suppressed as petitioner suggests. More importantly, this court is not prepared to conclude that, based on all of the evidence available to petitioner's trial counsel, the failure to seek suppression of the confessions was not within the realm of professional competence. It has been recognized that a failure to seek suppression of evidence which was arguably illegally seized may be part of a general trial strategy and does not necessarily constitute ineffective assistance. *See Kapsalis v. United States*, 345 F.2d 392, 394 (7th Cir. 1965). Here, petitioner's counsel apparently chose to forego seeking suppression of the confessions in light of his decision to pursue an insanity defense. The record indicates that there was ample factual and evidentiary support for that decision and this court cannot and will not second-guess what appears to have been sound trial strategy. The failure to seek suppression of the confessions therefore did not constitute ineffective assistance of counsel.

Petitioner further argues that his trial counsel's failure fully to investigate the Lupinacci case constituted ineffective

assistance. Defense counsel was clearly aware of the Lupinacci case, and knew that the investigation of Lupinacci relative to the Stamford prostitute murders had been abandoned by the police for lack of evidence. In these circumstances, it is questionable whether any further investigation by counsel was necessarily warranted. Nevertheless, as petitioner points out, there is nothing in the record to indicate that petitioner's counsel fully investigated the Lupinacci case. Assuming that the failure to investigate was an unprofessional error, petitioner has still failed to satisfy the second element of the *Strickland* test. Even if defense counsel had made a full investigation and discovered all of the evidence which petitioner refers to, counsel still would have been faced with the prospect of going to trial on five murder charges with a maximum possible sentence of 125 years. At the trial, the prosecution could have introduced as evidence signed confessions made by petitioner. With these considerations in mind, and in view of petitioner's psychiatric history, it cannot be said that petitioner has satisfied his burden of proving that a reasonably competent attorney would not have pursued an insanity defense even if the facts of the Lupinacci case were discovered.[1] Having failed to satisfy the "but for" element of the *Strickland* test, petitioner's ineffective assistance claim in this regard must fail.

C. **Prosecution's Failure to Disclose**

Petitioner next assigns constitutional error to the fact that the prosecution failed to disclose evidence relating to the Lupinacci case to defense counsel. As the Connecticut Appellate Court noted, much of the information obtained in the Lupinacci investigation was arguably exculpatory with respect to petitioner and therefore should have been disclosed to counsel as *Brady* material. *Miller v. Anglicker,* 4 Conn. App. at 421 n. 4. The appellate court went on to determine that petitioner had failed to satisfy the standard announced by the United States Supreme Court in *United States v. Agurs,* 427 U.S. 97 (1976), relating to the effect of a prosecutor's failure to disclose. According to *Agurs,* a court must review the entire record to determine if the omitted evidence creates a reason-

able doubt that did not otherwise exist. *Agurs,* 427 U.S. at 112. Clearly, the key consideration under *Agurs* is whether the failure to disclose affected the outcome of the trial.[2] The appellate court determined that petitioner had failed to prove that the outcome of the proceedings in the instant case would have been different if the prosecutor disclosed evidence relating to the Lupinacci case. This court agrees. Petitioner's trial counsel, an experienced criminal lawyer, decided to pursue an insanity defense. As discussed, *supra,* this was an entirely reasonable course of action in view of the entire record. There is nothing in the record to suggest that counsel would have proceeded differently had the facts of the Lupinacci investigation as they were then known been disclosed. Petitioner's argument under *Agurs* is therefore unavailing.

D. **Conclusion**

For the foregoing reasons, the petition for a writ of habeas corpus is denied.

SO ORDERED.

/s/ Ellen B. Burns

ELLEN BREE BURNS
UNITED STATES DISTRICT JUDGE

Dated at New Haven, Connecticut, this 28th day of July, 1987.

NOTES

[1] A further factor in the decision would be the question of the admissibility of such evidence lacking a direct connection of Lupinacci to the crimes. *State v. Giguere,* 184 Conn. 400, 405 (1981).

[2] Petitioner suggests that the Connecticut Appellate Court applied an improper standard under *Agurs.* As the appellate court pointed out, the *Agurs* test normally applies where there has been a finding of guilt. The pertinent inquiry in such a situation is whether the omitted evidence creates a reasonable doubt which would negate that finding. Here, petitioner was found not guilty by reason of insanity. Since the *Agurs* test cannot be strictly applied in these circumstances, this court believes that the state appellate court quite properly considered the effect of the failure to disclose on the course of the proceedings generally.

BENJAMIN F. MILLER, JR. *v.* COLIN C. J. ANGLIKER, M.D., DIRECTOR, WHITING FORENSIC INSTITUTE (2704)

DUPONT, C.P.J., HULL and BORDEN, Js.

The plaintiff, who had been found not guilty by reason of insanity on three counts of murder and who, after a hearing, had been ordered committed to a state forensic institute, petitioned for a writ of habeas corpus challenging his confinement. He claimed that he had been denied effective assistance of counsel at the trial on the criminal charges and that the state had failed at trial to disclose certain allegedly exculpatory material. The trial court ruled against the plaintiff on both of those claims and determined that the plaintiff had deliberately bypassed his right of direct appeal by not appealing from the commitment order. From that court's denial of his petition, the plaintiff appealed. *Held* that although, because it would have been improper for the plaintiff to raise the claims he raised here in an appeal from the commitment order, the trial court erred in determining that he had deliberately bypassed his right of direct appeal, that error was harmless since the court ruled correctly on the merits of his claims; the plaintiff did not sustain his burden of proving a violation of his right to effective assistance of counsel and this court could not conclude that the plaintiff's attorney at the criminal trial would have been reasonably certain to have proceeded differently had he had before him the allegedly exclupatory material.

Argued April 2—decision released July 2, 1985

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Middlesex and tried to the court, *Hale, J.*; judgment denying the petition, from which the plaintiff appealed to this court. *No error.*

John R. Williams, for the appellant (plaintiff).

Frederick W. Fawcett, assistant state's attorney, with whom, on the brief, was *Donald A. Browne*, state's attorney, for the appellee (state).

HULL, J. This is an appeal from the denial of Benjamin Miller, Jr.'s petition for a writ of habeas corpus which, if granted, would have released him from

confinement at the Whiting Forensic Institute. We conclude that the trial court's denial of that petition was proper.

The court's meticulous and comprehensive findings of fact need only be summarized here. On March 17, 1972, Benjamin Miller, Jr., was arrested after an investigation of nearly five years duration into the murders of five black prostitutes. All were found strangled in a wooded area off of the Merritt Parkway, near River Bank Road in Stamford. The first victim, Rosell Rush, was found on August 4, 1967. Thereafter, the bodies of Donna Roberts, Gloria Kahn, Gail Thompson and Alma Henry were found on May 3, 1968, September 8, 1968, July 10, 1971, and August 22, 1971, respectively.

There was a substantial amount of publicity about the murders in the Stamford area. The black community, as well as other groups, expressed anger over the lack of progress in the police investigation. For that reason, a special team of state police officers and a Stamford police detective was created to investigate the murders full time.

After a Reverend James Miller received an anonymous telephone call describing the location of one of the bodies and expressing the desire that the victim receive a Christian burial, the police made a check of other Reverend Millers in the Stamford area. As a result of that check, the name of the plaintiff, who claimed to be an ordained clergyman, was placed on a file card. After three more bodies were found, Miller was invited to an interview. He wrote a letter to the police saying that he could not come.

Nothing further was done to investigate Miller until January, 1972, when the card and Miller's failure to come in were discovered by the detective assigned to the investigation. At that point, a background investigation of the plaintiff was initiated. It was determined

that Miller was a white employee at the Darien post office who walked past the home of Reverend James Miller every day during lunch. The plaintiff also spent a great deal of time preaching to the black community in Stamford, particularly to the women of the community. Miller also had a history of mental illness, having, at one time, been hospitalized at Fairfield Hills State Hospital. Police visited Fairfield Hills and were given access to Miller's files without his prior approval.

The police then expanded their investigation of Miller, interviewing his wife and acquaintances. They found that Miller had marital problems. He had beaten and threatened to kill his wife. Finally, they interviewed the plaintiff at his home, beginning with a reading of his *Miranda*[1] rights. This interview was not productive, however, because the plaintiff appeared to be somewhat incoherent.

Between January 26, 1972, and February 16, 1972, Miller was interviewed by the police four more times. These interviews were lengthy sessions, each of which began with a reading of Miller's *Miranda* rights. Miller was described as a compulsive talker who forced the police officers to work in shifts. During one of the interviews Miller offered to take a polygraph test, which was administered on the next occasion upon which he spoke to police. The test was inconclusive due to Miller's erratic emotional changes.

During these interviews, Miller made several incriminating statements to police officers. He stated that he had learned of Gail Thompson's murder some six weeks later. This was directly contradicted by the statement of the victim's mother, who said that Miller had visited the family home "a couple of days" after the body was found to express his condolences. Miller

[1] *Miranda* v. *Arizona*, 384 U.S. 436, 479, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

also admitted to having had sexual relations with Gail Thompson in his car in North Stamford, and when he was shown a photograph of her body, he correctly identified the item around her neck as a handkerchief although the publicized version of the killings suggested that all of the victims had been strangled with bras. Further, when Miller was shown a photograph of the body of Alma Henry, he correctly identified adhesive tape as the substance wrapped around her head, stating "I don't use tape that narrow." From the photograph it was almost impossible to identify what was wrapped around her head, and the fact that tape had been used was not publicly known.

On February 16, 1972, police suggested to Miller that he should consult Robert Miller, a psychiatrist at Fairfield Hills. He declined to see Robert Miller, preferring to see Shirley Williams, a psychiatrist at the Norwalk Hospital, instead. After speaking with Williams, Benjamin Miller was seen by Michael Moadel, another psychiatrist, who signed an order for Miller's temporary involuntary commitment to Fairfield Hills. Miller was immediately taken to Fairfield Hills and was admitted.

In early January, 1972, State Police Detective Robert Geoghan and Stamford Police Detective George Mayer had visited Fairfield Hills where they discussed Miller's background with Robert Miller, who was considered to be "somewhat of a forensic psychiatrist." He agreed that if the plaintiff could be admitted to Fairfield Hills, it would provide an excellent opportunity to conduct interviews of the plaintiff.

Throughout his confinement, there has been substantial agreement that Benjamin Miller suffers chronic schizophrenia. There was also evidence in his hospital records that he had been placed on suicide watch occasionally, that he was delusional and that "religosity [sic]

is in evidence." Miller regularly received medication in the form of trilafon and, at some point, he was also given sinequan.

Miller was interviewed on several occasions by Robert Miller, by the investigating officers or by all of them. Robert Miller indicated to the officers that he believed that the plaintiff was, in fact, the killer of the women, although at no time did he obtain a confession. These interviews culminated, on February 29, 1972, in Benjamin Miller's handwriting a confession to the murders of seven women. At another point, he wrote that he had killed Gail Thompson, Alma Henry, Sissy Rush and others he could not remember. The plaintiff led the conversation during which these confessions were made and his statements about the Gail Thompson murder corresponded to the physical findings at the scene.

On March 1, 1972, Miller signed both a handwritten statement and a typed duplicate admitting to and detailing the murder of Alma Henry. He also signed a statement indicating that he had returned, with police, to the murder scene where he pointed out the spot where the murder had occurred, and stating that he had tied her hands, taped her mouth and whipped her body with tree branches while he was killing her. These facts were not publicly known. In this statement, Miller also admitted that before Alma Henry died, but while she was unconscious, he had committed the act of cunnilingus upon her body.

On March 10, 1972, Miller signed another statement admitting to the murder of Donna Roberts, and giving considerable detail about her murder and the transportation of her body.

Each statement was witnessed by Geoghan and Mayer, who both stated that Miller had voluntarily led them to the murder scenes and to the places where the

bodies were deposited thereafter. Each statement also contained Miller's written acknowledgment of his rights. As a result of this investigation and the confessions, Miller was arrested on March 17, 1972, and was indicted by a grand jury on May 15, 1972, for the five murders listed above.

On the date of Miller's indictment, attorney Herbert Bundock was appointed to represent him. Bundock had been an assistant public defender for Fairfield County for ten years prior to his appointment to represent Miller. Although his position was part time, he spent practically full time on the job. Miller pleaded not guilty to all five counts and the case was continued to June 20, 1972, pending the filing of any pretrial motions.

On June 6, 1972, Bundock filed a motion for discovery which included a request for all exculpatory information in the possession of the prosecution. Bundock also obtained two pychiatric reports, dated April 14, 1972, and May 6, 1972, both of which confirmed that Miller was competent to stand trial. Bundock also reached an agreement with Joseph Gormley, the state's attorney involved in the case, which allowed him free access to the state's file on the Miller case. Gormley testified at the habeas corpus hearing that he was reasonably certain that Bundock had seen practically the entire file.

From the date of his appointment through the end of 1972, Bundock worked on Miller's case. He had a psychiatrist, Johnathan M. Himmelhock, appointed by the court and, from conversations with Himmelhock, Bundock concluded that the doctor would testify that Miller was insane.

Bundock also spoke with Miller and his father on several occasions during this time. Benjamin Miller, Sr., told Bundock, on April 1, 1972, that his son had stated that he was sick and had signed a confession, but that

he would sign anything. Miller, Jr., corroborated this version of the events on September 12, 1972. He stated that he had been afraid of a beating when he signed the statements and that, after they showed him photographs of the bodies many times, they drove him to the murder scenes and asked him if this was the place. He said he would respond by saying "I think so" to please them. He also stated that the police had repeatedly asked him to confess to the murders, had harrassed him, and had called him a liar. At no time did Bundock use any of this information to file a motion to suppress Miller's confessions. Rather, he came to an agreement with Gormley that Miller should plead not guilty by reason of insanity. Gormley agreed to present only a prima facie case under those circumstances. Both the plaintiff and his father willingly participated in that plea.

On July 29, 1972, Robert F. Lupinacci was apprehended in the act of attempting to strangle a black prostitute. The crime occurred in the same area as those of which Miller was accused. The report of this incident was eventually turned over to Gormley because of the similarities between the crimes.

Lupinacci was a known patron of Stamford's black prostitutes and he was allegedly in the downtown area on the night that Gloria Kahn disappeared. Lupinacci also admitted to having taken other prostitutes to the same place where the assault occurred. He frequently used pornographic literature and drove a car similar to one which had been seen in the same area where the body of Gail Thompson had been found.

A Stamford police officer informed the state trooper who was investigating the Lupinacci case that during the Alma Henry and Gail Thompson investigations, Lupinacci had inquired about the location and duration of police stakeouts relative to those investigations. Lupinacci had further commented that not all of the

murders had been committed with bras, a fact not known to the public.

The Miller case was opened because of the Lupinacci investigation. That fact was reported in the newspaper and was brought to Bundock's attention in the form of a scrapbook put together for him by Miller, Sr. During the investigation, the state police sent twenty-three items of evidence, obtained at the scenes of the murders with which Miller was charged, to the FBI for comparison with the Lupinacci case. In the end, however, Lupinacci was charged only with assault and the investigation was closed on September 23, 1972, with a statement that there was no solid evidence connecting Lupinacci to the killings of which Miller was accused. Gormley never offered the Lupinacci file to Bundock, nor did the evidence show that Bundock had ever requested it.

On January 30, 1972, Miller was found not guilty by reason of insanity of the murders of Donna Roberts, Gail Thompson and Alma Henry for which he was tried. He was ordered confined to Fairfield Hills pursuant to General Statutes § 53a-47 (c)[2] pending an examination

[2] General Statutes (Rev. to 1971) § 53a-47(c), at the time of Miller's confinement, provided: "(1) Upon certification by the superintendent of the hospital or institution that, in his opinion, such person is no longer mentally ill to the extent that his release would constitute a danger to himself or others, the court may order the release of the person confined at the expiration of thirty days from the time such certificate is filed. (2) At the time such certificate is filed with the court, a copy shall be furnished to the state's attorney or prosecutor who may request a hearing as to whether such person should be released. At such hearing, evidence of mental condition may be submitted. The confined person shall be released unless the state establishes by a preponderance of the evidence that such person is, at the time of hearing, mentally ill to the extent that his release would constitute a danger to himself or others. (3) The superintendent shall, during such confinement, submit to the court at least every six months a written report with respect to the mental condition of such person. Copies of such report shall be furnished to the state's attorney or prosecutor and counsel for the confined person. The court, upon its own motion or at the request of the parties, may at any time hold a hearing to determine whether

to determine whether he was a danger to himself or to others. At a hearing on March 29, 1973, Miller was found to be a danger to himself and to others and was confined to the custody of the commissioner of mental health. Miller has never disputed the validity of the March 29, 1973 proceedings, and, since his confinement, the superintendent of Fairfield Hills has filed reports every six months as required by General Statutes § 53a-47 (c) (3), concluding that Miller's release would still constitute a danger to himself or to others.

On January 21, 1982, nearly nine years after Miller was committed, he filed the present petition seeking a writ of habeas corpus claiming, essentially, two grounds therefor: (1) that he received ineffective assistance of counsel in violation of his constitutional rights; and (2) that the state's attorney withheld exculpatory information from him. The trial court concluded that Miller failed to prove either claim and, further, that Miller, by failing to appeal from the March 29, 1973 order committing him to the custody of the commissioner of mental health, was barred from presenting these claims for the first time in a habeas corpus petition.

In this appeal, Miller claims that the trial court erred: (1) in holding that he had failed to prove that he had not deliberately bypassed his right to appeal from the March 29, 1973 confinement order; (2) in holding that the prosecution did not withhold exculpatory information from him; and (3) in holding that his counsel was not ineffective, in violation of his rights under the sixth and fourteenth amendments to the constitution of the United States. We conclude that although the court erred in its application of the "deliberate bypass" rule,

such person should be released prior to the expiration of the maximum period, in accordance with the standards set forth in subdivision (1), provided such a hearing shall be held at least every five years."

that error was harmless in light of the court's correct conclusions as to the merits of the petition.

The trial court concluded that "the Petitioner cannot for the first time raise any issue as to the impropriety of [the commitment hearing of March 29, 1973] by habeas corpus. *Vena* v. *Warden*, 154 Conn. 363 [225 A.2d 802 (1966)]; *Blue* v. *Robinson*, 173 Conn. 360 [377 A.2d 1108 (1977)]." This conclusion misses the point of Miller's claims, for they do not relate to the commitment hearing, but to the original acquittal. Miller testified that he was never told of his right to appeal from his acquittal by reason of insanity. He never testified about whether he was told that he could appeal from the subsequent commitment order. Consequently the court concluded that he had failed to prove that he had not deliberately bypassed his right to appeal from the later order.

In *Vena* v. *Warden*, supra, the court stated that "a petitioner may collaterally raise federal constitutional claims in a habeas corpus proceeding even though he has failed to appeal his federal constitutional claims directly to us if he alleges and proves, by a fair preponderance of the evidence, facts which will establish that he did not deliberately bypass the orderly procedure of a direct appeal." Id., 366–67. Since Miller's constitutional claims do not arise out of the commitment order, but out of his acquittal, it was that judgment, if any, from which he should have been required to appeal.

Not only did Miller testify that he was not told of his right to appeal from his acquittal,[3] but the claims which

[3] We face, at this point, what appears to be a case of first impression in this country: Whether Miller could have appealed from the court's judgment of *not guilty* by reason of insanity. Since, in our view of the case, it is not necessary to rule on this issue, we decline to do so. We note, however, that, looking to the substance of the effect of this judgment on the plaintiff rather than to the form of the proceedings, he was thereafter subject to confinement in a state mental institution for up to twenty-five years

he raises in this petition are "more properly pursued on a petition for new trial or on a petition for a writ of habeas corpus rather than on direct appeal." *State* v. *Gregory*, 191 Conn. 142, 145, 463 A.2d 609 (1983), quoting *State* v. *Mason*, 186 Conn. 574, 578–79, 442 A.2d 1335 (1982); see also *State* v. *Chairamonte*, 189 Conn. 61, 64–65, 454 A.2d 272 (1983).

Although each of the cases cited immediately above dealt only with claims of ineffective assistance of counsel, the same rationale used therein applies to the present claim regarding the prosecutor's failure to turn over to Bundock alleged exculpatory evidence which would not ordinarily be part of the record in a direct appeal. In *State* v. *Chairamonte*, supra, the court, referring to its role in a direct appeal, stated: "Our role in a case like this, however, is not to guess at possibilities, but to review claims based on a complete factual record developed by a trial court. Without a hearing in which the reasons for counsel's decision may be elicited, any decision of ours on this claim would be entirely speculative." Id., 64; see also *State* v. *Mason*, supra, 579. Similarly, without a hearing in which Gormley's reasons for failing to disclose the Lupinacci evidence are elicited, and in which that evidence itself is provided, we would have an insufficient basis for deciding the merits of Miller's claim. See *State* v. *Grasso*, 172 Conn. 298, 301, 374 A.2d 239 (1977). Consequently, under the circumstances of this case it would have been inappropriate for Miller to raise either of these claims through a direct appeal.

which, of course, would not have occurred had he elected to go to trial and had he been found not guilty. Thus, to some extent, he is aggrieved of the trial court's judgment as required by Practice Book § 3000, even though that judgment conformed to his plea. Practice Book § 945, however, requires the court to notify the defendant of his right to appeal only where there has been a *conviction*. At the very least, his right to appeal directly was so questionable that his failure to take such an appeal should not bar our consideration of his habeas corpus petition.

In *State* v. *Mason*, supra, however, the court stated: "We note that a defendant may well be forced to raise a claim of ineffective assistance on direct appeal, even when the record is inadequate for review, because of the possibility that if this is not done collateral review of the claim may be precluded by a finding that the appellate process has been deliberately bypassed. . . . Whether there has been a deliberate bypass . . . must be determined on a case by case basis." (Citations omitted.) Id., 579 n.3. This statement cannot be construed as a prohibition of habeas corpus petitions in the absence of a prior direct appeal. Rather, it is merely a caution to counsel reminding them of the risks of such a petition. Under the circumstances of this case, however, we can find no fault in Miller's failure to directly appeal.

We conclude that because Miller's claims in this petition, in all likelihood, could not have been successfully appealed directly, there was no violation of the deliberate bypass rule in this case.

With regard to the merits of the constitutional claims raised by Miller's petition, those claims arise, to a great degree, out of the circumstances of the Lupinacci investigation. In that context, Miller seeks to augment the trial court's findings of fact with his own discussion of that investigation. Miller's claimed facts presented with regard to the Lupinacci investigation include the following: Lupinacci was a regular patron of Stamford's prostitutes. He was seen cruising in his car on the night of Gloria Kahn's disappearance, and was positively identified by another prostitute as having tried to pick her up on that same night.

On the night of Lupinacci's arrest, his car was searched and in the trunk was a deck of pornographic playing cards. One card was missing from the deck and a similar card had been found at the scene of the Gail

Thompson murder. Vacuum sweepings of the trunk also disclosed a "negroid limb hair." Lupinacci's car had also been seen at the area of the murders on prior occasions. Lupinacci was described as hating blacks and as a "sex nut" who had a history of sexually molesting women and who had been accused of rape in the past. He also, apparently, went to great lengths to devise a way to look up from a basement work site under the dresses of women walking by on the street. He was known to frequent bars which Rosell Rush was known to patronize, and he was a known patron of both Gail Thompson and Gloria Kahn.

In addition, Miller would further augment the court's findings of fact by adding a summary of the testimony of Michael Sheldon, a professor at the University of Connecticut School of Law, from the habeas corpus hearing. Professor Sheldon testified at length about the quality of Bundock's handling of Miller's case. It is sufficient for us to state that he made clear his opinion that Bundock's handling of the matter was not competent. The trial court did not, however, credit Sheldon's opinion which, of course, it was free to reject.

We note at the outset of our consideration of Miller's claims that they arise in a procedurally confused context. Ordinarily, claims of procedural misconduct or ineffective assistance of counsel arise after the accused has been found guilty. Here, however, Miller claims that he should have been acquitted unconditionally rather than by reason of insanity. Accordingly, the tests by which courts have traditionally decided the validity of claims such as those presented here do not mesh well with the facts of this case.

Miller claims that Bundock's failures as counsel were "glaring" and "legion." Specifically, he points to Bundock's lack of research into the Lupinacci case and to his failure to challenge the validity of Miller's con-

fessions although Miller had provided him with cause to dispute whether they had been made voluntarily. These failures, however, must be viewed in light of the agreement reached between the state and Bundock regarding Miller's insanity plea.

The standard used to review claims of ineffective assistance of counsel is whether defense counsel's performance was "reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law." *State* v. *Clark*, 170 Conn. 273, 283, 365 A.2d 1167, cert. denied, 425 U.S. 962, 96 S. Ct. 1748, 48 L. Ed. 2d 208 (1976), quoting *Gentry* v. *Warden*, 167 Conn. 639, 646, 356 A.2d 902 (1975); see also *Levine* v. *Manson*, 195 Conn. 636, 639, 490 A.2d 82 (1985); *State* v. *Chairamonte*, supra, 63. The burden here is on Miller to prove that counsel did not meet this standard; *Levine* v. *Manson*, supra, 640; *State* v. *Chairamonte*, supra; *State* v. *Clark*, supra; and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland* v. *Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674, reh. denied, 467 U.S. 1267, 104 S. Ct. 3562, 82 L. Ed. 2d 864 (1984).

"[A] court will not second guess the tactics and strategy chosen by trial counsel after reasonable investigation and research." Whitehead, Constitutional Criminal Procedure, 371-72; see also *Strickland* v. *Washington*, supra, 689; *Aillon* v. *State*, 597 F. Sup. 158, 164 (D. Conn. 1984); *Levine* v. *Manson*, supra, 648. Although we might, given the benefit of 20/20 hindsight, conclude that Bundock's approach was not the best possible one, "the claim of ineffective representation must be examined as of the time the questioned representation occurred." *Levine* v. *Manson*,

supra, 649; *Siemon* v. *Stoughton,* 184 Conn. 547, 554, 140 A.2d 210 (1981). Bundock knew of the Lupinacci investigation long before Miller's trial and, as the court below found, "on the strength of all the information available to him he had come to the conclusion that the best defense for his client was a plea of not guilty by reason of insanity." This decision required Bundock to consider the possibility of conviction for all five murders for which he was indicted and a resulting possible maximum sentence of 125 years; General Statutes § 53a-35 (c) (1) (Rev. to 1971); as well as the possibility of acquittal of the charges if he chose to pursue a complete acquittal. His decision to opt for the security of an agreement with the prosecution was well within the bounds of prudent advice to his client. It certainly did not "so [undermine] the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result" as required by *Strickland* v. *Washington,* supra, 686. Nor has Miller established that, but for Bundock's decision, the result for him would have been different, i.e., that he would have been acquitted of the charges against him. Id., 2068. We conclude, therefore, that Miller has not sustained his burden of proving a violation of his constitutional right to the effective assistance of counsel.

Miller's second claim is that Gormley committed misconduct by failing to provide Bundock with the exculpatory evidence contained in the Lupinacci file. This claim is premised upon the holding in *Brady* v. *Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), where the Court stated that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment . . . ." Id., 87.

In cases, such as the present one, where only an initial general request for "any exculpatory information

or material" has been made, it has been held that "there is no significant difference between cases in which there has been merely a general request for exculpatory matter and cases . . . in which there has been no request at all." *United States* v. *Agurs*, 427 U.S. 97, 107, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976). Consequently, the test applied for determining the materiality of evidence[4] where no request has been made is equally applicable to the present case. That test is whether "the omitted evidence creates a reasonable doubt [about the defendant's guilt] that did not otherwise exist . . . ." Id., 112.

Technically, the *Agurs* test is not applicable to this case because Miller was found *not guilty* by reason of insanity. Nevertheless, since we have concluded that practical justice requires us to consider the combined effect of the finding of not guilty by reason of insanity together with the plaintiff's continued involuntary confinement at the Whiting Forensic Institute, we will apply the general principles of *Brady* concerning the prosecution's failure to disclose exculpatory evidence to this case. Accordingly, we must determine whether it is reasonably certain that the contents of the Lupinacci file should have caused Bundock to change his mind about his decision to recommend that Miller adopt an insanity plea, and that, had he done so, upon a trial after a plea of not guilty, a reasonable doubt would have been created by the Lupinacci material. Even if we assume, arguendo, that, had the Lupinacci

[4] With regard to the other aspect of the *Brady* test, it is beyond doubt that evidence tending to prove the guilt of a third party is exculpatory with regard to the accused. In *United States* v. *Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976), the court held that "[i]f there is a duty to respond to a general request . . . it must derive from the *obviously* exculpatory character of certain evidence in the hands of the prosecutor." (Emphasis added.) Id., 107. This has been interpreted as requiring disclosure only where "the exculpatory nature of the information in the hands of the prosecutor is obvious." *State* v. *Palmer*, 196 Conn. 157, 160, 491 A.2d 1075 (1985). That standard is clearly satisfied in this case.

evidence been admitted at such a trial, it would have created a reasonable doubt, nonetheless the first part of the test is still not met in this case.

There is a point at which the prosecution must yield exculpatory evidence which has not been requested by the defense, but, as the Court said in *United States* v. *Agurs,* supra, "we have rejected the suggestion that the prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel . . . ." Id., 111. We must, necessarily, leave the initial determination of what to surrender voluntarily, to the prosecution. Id., 107. We can only subsequently determine whether the failure to surrender evidence was "of sufficient significance to result in the denial of the defendant's right to a fair trial." Id., 108. We conclude that, in the unusual circumstances of this case, the state's attorney's failure to turn over the Lupinacci evidence to the plaintiff did not deny the plaintiff a fair trial.

From our vantage point, twelve years after the events, we must assay the factors leading to Bundock's handling of the case as he did. He was an experienced criminal defense lawyer. He knew both the strengths and weaknesses of the state's case against his client. He knew of Miller's confessions and other highly incriminating evidence and he knew of the unanimous opinions of the psychiatrists who had examined Miller that he was insane. He knew of the probable lengthy incarceration, tantamount to the duration of his client's life, that Miller would face if he were convicted on all three counts, or possibly on all five counts upon which Miller had been indicted had he not accepted the agreement with the prosecution to plead not guilty by reason of insanity. He came to the reasonable conclusion that his client was, in fact, guilty and needed confinement in an institution and close supervision and treatment. Under General Statutes § 53a-47, the superintendent of the institution was required to file a report

with the court every six months with respect to Miller's condition. Further, General Statutes § 53a-47, at the time of Miller's commitment, placed the burden upon the state to establish, upon the preponderance of the evidence, that the defendant was mentally ill. To sum up the situation Bundock faced, he chose a path which meant that his client, against whom the evidence was sufficiently strong, not only for a grand jury to indict him on five counts of murder, but, in all likelihood, to convict him of one or more of those murders, would not go to prison but rather would either be confined in a hospital, which all medical testimony indicated was appropriate, or be released as a free man. Applying, as we do, the *Brady* exculpatory rules, we cannot conclude that, had Bundock received all of the Lupinacci data in the state's possession, his resulting analysis thereof would have been reasonably certain to cause him to handle the case differently.

There is no error.

In this opinion the other judges concurred.